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The Supreme Court of the United States

OCTOBER TERM, 1933.

No. 114.

THE STATE CORPORATION COMMISSION FOR THE STATE OF KANSAS, HOMER HOCH, JESSE W. GREENLEAF, ET AL.,
APPELLANTS,

vs.

THE WICHITA GAS COMPANY, HUTCHINSON GAS COMPANY, NEWTON GAS COMPANY, ET AL.,
APPELLEES.

SUPPLEMENTAL BRIEF OF APPELLANTS ON QUESTIONS ARISING ON ORAL ARGUMENT.

STATEMENT.

In our opinion the supplemental brief filed by appellees on the question of jurisdiction tends to confuse the issues and create uncertainty as to the manner in which the investigation was handled by the Commission. We have therefore requested the court for permission to discuss briefly the facts pertaining to these matters, all of which are disclosed by the record.

Appellees express surprise and confusion because of alleged inconsistencies on the part of the Commission

and on the part of the Commission's attorneys. We do not believe it necessary to enter into a controversy as to these expressions. The facts as disclosed by the record show a consistent and orderly procedure on the part of the Commission.

We find it impossible in our reply to follow the order of argument in appellees' supplemental brief because of the manner in which the various theories are comingled. We will therefore discuss in order, the jurisdiction of the Commission, what was done by the Commission and the purpose of the investigation, the jurisdiction of the Federal Court, and what appears to us to be the contentions set forth in appellees' supplemental brief.

JURISDICTION OF THE COMMISSION.

We admit that the Commission is a creature of statute. We do not believe it necessary to go into a lengthy discussion to establish its broad general powers which are common to all such regulatory bodies.

The Revised Statutes of Kansas, R. S. 66-101 conveys general powers as follows:

> "The public utilities commission is given full power, authority and jurisdiction to supervise and control the public utilities and all common carriers, as hereinafter defined, doing business in the State of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction."

The statute makes it the duty of all public utilities to charge none but just and reasonable rates. (R. S. 66-107.)

In addition to its power to investigate and regulate rates on its own motion, the act specifically gives the Commission authority to investigate on complaint or on its own motion "any regulation, practice or act whatsoever affecting or relating to any service performed by such public utility or common carrier for the public." (R. S. 66-110, 66-111.)

The power of the Commission to correct such regulation, practice or act if found to be improper is provided for as follows:

> "And if it shall be found that any regulation practice or act whatsoever, relating to any service so performed or to be performed by such public utility or common carrier for the public in any respect is unreasonable, inefficient, insufficient, unjustly discriminatory or unduly preferential or otherwise in violation of any of the provisions of this act, or of any of the laws of the State of Kansas, the public utilities commission shall have full power, authority and jurisdiction to substitute therefor such other regulations, classifications, schedules practice service or act as they find and determine to be just, reasonable and necessary." (R. S. 66-113)

This is all in addition to the power given to the Commission to investigate and order substitutions for "rates, joint rates, fares, tolls, charges, rules, regulations, classifications or schedules."

These statutes are set out in full in an appendix attached to this brief.

The broad powers to the Commission were stated by the Kansas Supreme Court in State, ex rel. v. Postal Telegraph Co., 96 Kan. 298, 304 as follows:

"Continuing this examination of later enactments, we find the Commission vested with full power, authority and jurisdiction to supervise and control the public utilities and common carriers, and empowered to do all things necessary and convenient for the exercise of the power, authority and jurisdiction. That is to say whatever power is necessary to the effectual exercise of the specific powers conferred is likewise conferred."

It necessarily results that under the broad supervisory power granted the Commission it was clearly within its jurisdictional authority when it proceeded to investigate the practice of the distributing companies of paying 40 cents to its affiliated company for gas, as a preliminary step in determining the reasonableness of the distributing companies rates to the consumer. This payment for gas made up the material part of the expense of the distributing companies.

There was no other method by which to determine the reasonableness of the contract but a lengthy investigation.

As stated by the Court in its opinion:

"We are of the opinion that the facts here justify the conclusion that the Cities Service Company, together with the Gas Service Company, the distributing companies, the Empire Gas & Fuel Company and the Cities Service Gas Company are engaged in a common enterprise, namely, the transporting and furnishing of gas to local consumers; that the Cities Service Company exercises such complete dominion and control over the Cities Service Gas Company and the distributing companies that, under the general rules of agency, the Cities Service Gas Company and the distributing companies are mere agen-

cies or instrumentalities of the Cities Service Company; and that, in substance and effect, the Cities Service Company is, through such agencies, supplying gas to local consumers on demand and is engaged in a local business." (R. 286.)

The Commission adopted the only practicable procedure. The distributing companies consisted of 135 separate operating units, operating in as many separate cities. They were all similarly affected by the contracts. Only by a joint hearing could all their rights be protected. The companies recognized this before the Commission and agreed to proceed jointly in the investigation of the contracts. (R. 236-7.)

It necessarily results that the first step in the investigation of the reasonableness of the distributing companies' rates had to be a determination of the reasonableness of the affiliated company contracts where they could all appear jointly. This would be followed by a separate hearing as to the reasonableness of the rates of each separate distributing plant which covered matters in which there was no joint interest.

The Commission in its proceedings acted under the authority of the statutes above referred to and the decisions of Smith v. Illinois Bell Telephone Company, 282 U. S. 133, and Western Distributing Company v. Public Service Commission of Kansas, 285 U. S. 119.

PURPOSE OF INVESTIGATION.

It is the contention of the Commission and, we submit the record plainly shows, that the proceeding taken by it was for the purpose of fixing the rates charged by the various distributing companies to their local consumers, in each city in Kansas served by them. That the first step in this investigation required a determination by the Commission of whether certain contracts which were common to all of the distributing companies, to wit the Doherty $1\frac{3}{4}$¢ charge, the Gas Service Company charge, and the gate rate, were reasonable. That the order expressed the Commission's intention, if the investigation showed that any such charge was unreasonable, then as a second step to investigate the rates which each of the distributing companies charged to its consumers, and that the commission proposed after giving effect to the reasonable cost of gas as found and such other reductions as such investigation should disclose were proper, to fix a local rate, for each of said cities.

We think the original order of July 2, 1931, (R. 26) plainly shows this.

After advising that the reasonableness of certain contracts by the distributing companies would be investigated, this order recited that the respondent distributing companies would be required,

> "to show cause why such holding company contracts, or service or commodity charges, should they be found to be unreasonable, should not be disallowed as operating expense of the distributing companies, and adjustment made in this respect as to charges made to the consumers."

On the completion of the first step of this proceeding wherein the reasonableness of the contracts mentioned were investigated, and determined, the Commission made its order of August 31, 1932, Exhibit L, (R. 59,) finding that the Doherty contract and the gate rate of 40 cents were unreasonable, and that a gate rate of 30 cents, was reasonable, and requiring that after September 1, 1932, the respondent distributing companies should cease to set up *on their books* as an operating expense, such payments, and give no consideration to such payments in fixing a rate for the domestic consumer. This order notified the respondent distributing companies

> "That on the 17th day of October, 1932, the distributing companies, respondents above named, appear before the Public Service Commission at 10:00 o'clock A. M., and show cause to the Commission why the reduction in expenses as above set forth should not be passed on to the consumers with such other reductions as may be found reasonable."

We think these two orders plainly show that the purpose of the commission was, if the investigation disclosed the unreasonableness of the contracts under consideration, then as the next step and as a part of the proceeding, that a hearing be had as to each city, to determine from such hearing what the local rate should be for such city after giving effect to its findings and determination as to their said contracts, and that by the order Exhibit L. (R. 62) the respondents were given due notice of such purpose of the Commission, and a full and complete opportunity to be heard on the question as to a proper local rate. And we submit that the permanent injunc-

tion by the District Court prevented the Commission from concluding its investigation.

It is true that on August 31, 1932, the Commission made a second order, Exhibit M, (R. 63,). But this was a mere interim order to remain in force pending the hearing ordered from October 17, 1932, requiring the respondent distributing companies to readjust their local rates at once so as to reflect the elimination of the Doherty charge and the 30 cent gate rate. In making this interim order the Commission assumed, without giving the distributing companies an opportunity to be heard, that the local rates then being charged, would be unreasonable to the extent of the reduction in their operating expenses, caused by the eliminating of the Doherty 13¼% charge and by the reduction of 10 cents in the price for gas.

If this assumption had been determined to be true then we think the Commission would have been justified in making this second order Exhibit M.

The Commission realized however, when this second order was called in question that the respondent distributing companies, had a right to be heard on that question before the order could be made, and that a hearing might disclose in some cases, after giving effect to this reduction in operating expenses, that the local rate, still might not be unreasonable and subject to reduction, and in other cases the hearing might disclose that a reduction of even more than the saving caused by these reduced expenses, would be proper.

For this reason the commission promptly on the application for temporary injunction confessed the illegality of the second order Exhibit M.

It made the same confession in its answer. The Commission does not now complain of the injunction as to the second order.

JURISDICTION OF THE COURT BELOW.

As was stated by counsel for the Commission in oral argument before this Court the Commission has no desire to avoid an early judicial determination of the propriety of its finding as to the reasonableness of the contract for gas at the city gates.

It has however always been the position of the Commission that the Federal Court had no jurisdiction over the controversy because of the absence of a federal question.

The appellees devote much space in their brief as to the inconsistent position of the appellants on this question. The position taken by the appellants before the lower court is a matter of record and does not depend upon conclusions or argument.

In addition to its motion to dismiss because of the absence of a federal question presented and overruled before answer the appellants again presented the question in its answer as follows:

> "These defendants answering further allege that the order issued by the Commission on August 31, 1932, was the reasonable exercise of the jurisdiction conferred upon them by the laws of the State of Kansas, and that the plaintiff has not thereby been denied any of the rights which they may have under the constitution of the State of Kansas or the constitution of the United States.

Defendants admit that that part of its order, Exhibit "M" to plaintiff's bill of complaint, dated August 31, 1932, wherein the defendant commission ordered the distributing companies from and after September 1, 1932, to deduct the excess between what the distributing companies were then paying for gas at the city gate and thirty cents per M. c. f. of gas and pass the difference to the consumer, is null and void, and further allege that these defendants have abandoned said order and allege that said Commission now has no intention of enforcing or attempting to enforce said order; that the defendant Commission relies upon and alleges it has the right to enforce its order made on August 31, 1932, Exhibit "L" attached to plaintiff's bill of complaint, whereby it ordered said distributing companies to show cause why they and each of them should not pass said reduction in price to be paid for gas at the city gate on to the consumers and in this connection these defendants allege that such proceedings contemplate that an investigation be made as required by law as to each of said distributing companies to determine whether the earnings of said distributing company, based upon the fair value of their property are excessive and unreasonable, after giving effect to the said thirty cent gate rate and all other facts bearing upon the question.

Defendants allege that unless and until said hearing is had and these defendants make an order determining that said rate to the consumers be reduced, that its said order, Exhibit "L," will not and may not affect the plaintiff, and that until an order is made reducing said rate to said distributing companies by the consideration of said reduced gate rate this court has not and will not have jurisdiction of the subject matter of this action.

Wherefore Defendants, having answered all and singular those parts of the bill of complaint material and necessary to answer, pray that notwithstanding

they have answered all the allegations of the bill of complaint that the court dismiss the bill of complaint for the reason and on the ground that it plainly appears from the averments therein contained that no federal question is raised by the bill of complaint and this court is without jurisdiction to try the cause." (R. 264, 265.)

The position of counsel in presenting this question to the District Court is also in writing and speaks for itself. In the brief before the District Court it was said:

"The plaintiffs raise three constitutional objections, as follows:

1. Confiscation of property.

2. Interference with the right to contract.

3. Interference with interstate commerce.

An examination of the order clearly discloses that none of these constitutional prohibitions are affected.

All the order does is to find that the contracts are unreasonable, and finds the extent of the unreasonableness.

It does not take any property from the pipe-line company. It continues to collect the same amount. It does not take any property from the distributing companies. They will continue to earn the same amount until a valid order is made requiring them to make an adjustment to the consumer.

The order interferes with no contracts or rights. The distributing companies are not ordered to discontinue the contract nor to discontinue any payments made thereunder. The contract remains in full force and effect. The only thing which the order does is to find that the payments made under the contract are unreasonable. Because of the affiliated relationship, and the fact that all of the net earnings over

and above the interest requirements of both companies pass into the hands of the Cities Service Company, the holding company, there can be no interference with any constitutional right nor privilege until some order is made which in some way affects the companies financially or otherwise. We therefore submit that any order or finding which this court makes in the premises must be a moot issue and upon a matter which does not present an actual controversy."

Without adding to or taking from this statement, we again submit it on the question of federal jurisdiction.

It has never been the thought of the Commission that the companies could not have a judicial review of its preliminary findings and order as soon as made. This remedy was in the state courts, however, and not in the federal, because of the absence of a federal question.

The Revised Statutes of Kansas, R. S. 66-118, provides in part:

"Any common carrier or public utility governed by the provisions of this act, or other party in interest, being dissatisfied with any order of the commission fixing any valuation, toll, rate, joint rate, fare, charge, or findings, rules or regulations, classifications, schedules, or any order or ruling fixing any regulations, practices or service, or order or ruling relating to the issuance of stocks, bonds or other securities hereinafter provided may, within thirty days from the making of such order, commence an action in a court of competent jurisdiction, against the public utilities commission as defendant, to vacate and set aside any such order, finding or decision of the public utilities commission on the ground that the valuation, toll, rate, joint rate, fare, charges, orders, rules, regulations, findings, classifications or schedules in such decisions are unlawful or unreas-

> onable, or that any such regulation, valuation, practice or service fixed in such order or decision is unreasonable."

The statute is set out in full in the appendix.

It therefore clearly appears that had the companies sought a judicial review in the state courts, they had a complete statutory remedy, but instead they sought the jurisdiction of the Federal Court and the absence of federal jurisdiction was disclosed by their own pleadings.

The appellees raised the question in their own briefs as to the moot issue. We do not attempt to master the ingenious argument by which the appellees would give the lower court jurisdiction of the case on its merits and then have the issue become moot so as to prevent a review on appeal. We believe that their rambling argument ends when met with the proposition that under Section 266 of the judicial code the Commission has a right to have reviewed any decree of a District Court enjoining the enforcement or execution of an order issued by it.

The Commission was proceeding on an orderly investigation in accordance with the jurisdiction conferred upon it by the statutes heretofore set out.

It necessarily follows that either the District Court had no jurisdiction to hear the case on its merits, or if it did the appellants have a right to a review on the merits.

If the District Court had no jurisdiction to enjoin the Commission's order, Exhibit L, its decree must of course

be reversed and the Commission permitted to proceed under its valid order.

The Federal Court will not interfere with the legislative process of the Commission except to enforce constitutional rights.

The function of the Federal Court was expressed by Chief Justice Hughes in the recent case of Los Angeles G. & E. Corp. v. Railroad Com., 289 U. S. 287, 304, as follows:

> "We approach the decision of the particular questions thus presented in the light of the general principles this Court has frequently declared. We have emphasized the distinctive function of the Court. We do not sit as a board of revision, but to enforce constitutional rights. San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446, 47 L. Ed. 892, 896, 23 S. Ct. 571. The legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the Court may not interfere with the exercise of the State's authority unless confiscation is clearly established."

The right of the company to object only to confiscation regardless of the Commission's procedure was stated by

Justice Butler in the case of United Fuel Gas Co. v. Railroad Comm., 278 U. S. 300, 309, as follows:

> "The contentions also that the commission was not lawfully created under provisions of the state Constitution, and that its order was void because not supported by findings, have the same and no greater force than the objection that the rate is confiscatory. Suitors may not resort to a court of equity to restrain a threatened act merely because it is illegal or transcends constitutional powers. They must show that the act complained of will inflict upon them some irreparable injury. As the court below held, appellants, as public service companies, are bound by the common law, if not by statute, to render their service at reasonable rates. If the rates are not shown to be confiscatory they cannot complain that the order purporting to impose them was void, for they have suffered no injury even though the order was unauthorized."

APPELLEES' CONTENTIONS.

We have experienced difficulty in ascertaining exactly what the appellees are contending in their supplemental brief and the reasons for their contentions.

As we read their brief their contentions are:

1. That although the Commission abandoned and confessed that its second order of August 31, 1932, Exhibit M was illegal, a federal question still remained for decision by the lower court.

2. That the local rate which respondents should charge was fixed without giving the respondents their day in court.

3. That the costs of the proceeding were taxed to respondent appellees and that this was confiscation.

4. That by the Commission's order respondents would be compelled to pay 40 cents to the pipe line company and if they were required to base their rates on a 30 cent gate rate, they would not even earn operating expenses.

5. That the orders of the Commission of July 31, 1932, Exhibits L and M, although made as two orders, are in fact but one order and since the order Exhibit M is illegal—then both orders are illegal.

6. That in truth and in fact the proceedings by the Commission are a completed rate case, and the effect of the order is to confiscate appellees' property.

7. That if this Court should reverse the lower court the second order which has been confessed illegal would still be in force.

We shall discuss these contentions in their order.

1.

On page 2 of their brief, appellees state that the questions now presented are:

> "Did the court below on the allegation of the bills have jurisdiction of the case as originally instituted? If so, was such jurisdiction defeated because of some concession made during the progress of the case?"

Our answer to these questions is as follows:

The Court did have jurisdiction of the case as originally instituted insofar as it applied to the second order Exhibit M, which temporarily passed the reductions found to be proper by its first order to the local rates without first giving the appellees the right to be heard thereon, but only so far as it concerned said second order. In view of the fact that the second order was

only an interim order, when the Commission came in on the application for an interlocutory injunction and confessed that the second order was illegal and when it reiterated this statement in its answer and informed the court that it had abandoned said order because it was void, the court had jurisdiction to permanently enjoin this second order.

As to the first order we contend the court had no jurisdiction because the bills showed on their face that it was simply a preliminary order in the Commission's attempt to fix a local rate and that the appellees were not and could not be affected thereby unless and until the rate investigation started by the Commission of which the first order was a preliminary step was completed.

2.

On page 20 of their supplemental brief and at various other places the appellees contend that their local rate was fixed without notice and giving them a chance to be heard.

The claim is based upon the contention that the second or ad interim order of July 31, 1932, requiring the reduction to be passed on to the consumers until the hearing thereon fixed for October 17, 1932, is still in full force and effect. We think it is sufficient answer to this contention to call attention to the fact that the invalidity of this order Exhibit M, was confessed, and the order was abandoned, by the answer of Commission (R. 264-5). Appellants are not complaining of the in-

junction insofar as it pertains to order Exhibit M. Appellees have called attention to the fact that appellant is not complaining of the decree of the Court insofar as it permanently enjoins this order (Appellees' Sup. Brief p. 25).

It is conceded that without a hearing the Commission has no right to change or fix the local rate charged by the distributing companies.

It is true also that the Commission sustained an objection to the offer of appellees to the value and rate of return of the various units singly and collectively. But this was simply a matter of procedure, the Commission believing and holding that until the matters then under investigation which were common to all of the respondent distributing companies, to-wit: the 1¾% contract, the Gas Service Company's charge, and the gate rate, that it should not go into or hear evidence on valuations and rates of return of the 135 operating units, as the testimony as to one would not be germain to the other 134.

As was stated by counsel, during the colloquy at the hearing before the Commission, in answer to the statement of counsel for appellees, asking for a hearing for each of the distributing companies as to its valuation and financial experience.

Mr. Hatcher:

> "That is a question to take up after the Commission makes an order." (Appellees' brief, p. 169.)

After the Commission made its findings as to the contracts, common to all the distributing companies, it did made an order setting down for hearing on October 17, 1932, the question of the local rates to be charged to consumers, at which time the respondents were required to show cause and thus present any evidence as to the reasonableness of their respective local rates, from which it was intended that the Commission would determine the reasonableness of the local rates and fix them accordingly.

We submit but for the permanent injunction as to the first order, Exhibit L, that such hearings would have been held and from them such determination would now have been made—and that the only reason why appellees have not had their day in court as to their respective local rates, is because of the decree of injunction of the lower court.

3.

Appellee's contention that by its order of Aug. 31, 1932, Exhibit L, that the taxing of costs of the hearing to the distributory was confiscatory.

This claim is made by appellees on page 6 of their supplemental brief.

We do not believe that the taxing of the costs of a hearing to the utility under investigation by the Commission where it is acting within its jurisdiction, and is authorized so to do by statute, can in any sense be held to be confiscatory of its property. We know of no authority so holding.

4.

Appellees, contend, that the evidence shows that, if the distributing companies should be compelled to pay the pipe line company 40 cents and base their rates at 30 cents they could not earn even operating expenses.

This contention was made in appellees original brief and on page 4 of their supplemental brief, and is an argument going to the merits rather than jurisdiction.

We feel that we have fully answered this contention in our original brief at pages 99 to 103, to which we respectfully refer the court.

5.

Appellees contend, that the orders of the Commission of July 31, 1932, Exhibits L and M, although made as two orders are in fact but one order and since Exhibit M has been confessed to be illegal, then both orders are illegal.

This contention is made by appellees on page 9 of their supplemental brief. Counsel says:

> "If considered as one, the part of the order fixing rates was admitted by appellant to be invalid on one ground, and was found by the court to be invalid as to that ground and for the reason that it was confiscatory. This left nothing but the order Exhibit L upon which the order establishing rates was based which should have fallen and been permanently enjoined as a part of one invalid order."

Counsel are in error in their contention that the court found that the second order of August 31, 1932, Exhibit M, requiring the distributing companies effective at once to pass on the reductions on account of the Doherty

charge of 1¾% and the reduction on account of gate rate to be "passed on" to the consumers, was confiscatory. This second order was by the Commission abandoned and confessed to be invalid. Not because it was confiscatory but on other grounds and the court had no occasion to and did not find it to be confiscatory.

We are unable to see why, when in fact the Commission made two different orders, it logically follows that they must be considered but one order. The first order was complete in itself. It found as to the reasonableness of the contracts under investigation and set down for hearing and notified the distributing companies to appear on a day certain for an investigation of their local rates to consumers, as such rates might be effected by the reduction found by the Commission to be proper. The Commission claims that its first order Exhibit L was but the step in an orderly investigation of the local rates of the respondent distributing companies with the object on the part of the Commission to establish after an investigation such local rates. This order Exhibit L can be given effect without recourse to the second order and has no connection with the second order.

The second order was an ad interim order intended as is shown on its face to be in force only until the hearing provided by the first order. It was void because it attempted to put in force at once and without a hearing on that question, a reduced local rate reflecting the reductions determined by the Commission by its first order Exhibit L and was based on the erroneous assumption by the Commission that necessarily the reduction would re-

sult in a reasonable local rate which would afford the distributing companies a fair rate of return.

In order to make the first order, an investigation requiring months and great expense was necessary. The second order was without investigation, and was based on an erroneous assumption.

We submit that appellees' contention is unreasonable and the fact that the second order was void does not affect the first order and render it also void.

6.

Appellees contend that the proceedings by the Commission constitute a completed rate case, the effect of which is to constitute confiscation.

On page 24 of their supplemental brief appellees state:

> "If the proceeding before the Kansas Commission is to be considered as a completed rate case with a final order establishing rates for domestic consumers (as it must be or the final order, Exhibit "M," would not have been issued), then the court below had jurisdiction as otherwise rates would be now in effect not even producing operating expenses, the appellees would be foreclosed and estopped to question the reasonableness or legality of the thirty cent city gate rate in all future proceedings and the costs of $66,936.08 would be collected."

This statement is based on appellees' contention that the Commission has completed its investigation and has made a final order effecting the local rates. But this is contrary to the facts. Exhibit M has been confessed to be invalid and the Commission has stated in its answer

that it abandoned this order and does not intend to enforce it. At most, Exhibit M was only an ad interim order to last until the hearing which the Commission provided for on October 17. It has been enjoined with the consent of the Commission and no complaint is here made as to said injunction. Since the premises on which said contention is made are erroneous, the conclusion which appellees draw from said erroneous premises is unimportant.

7.

Appellees contend, that this Court has no authority to set aside the decree of the lower court enjoining Exhibit M or to order a dismissal of the case below.

On page 25 of its supplemental brief, appellees state:

> "The appellant did not appeal from the decree of the court below permanently enjoining that part of the orders fixing local rates (Exhibit "M"); the injunction as to that order is not before this court and in our view of the case this court has no authority at this time to set it aside or order a dismissal of the case in the court below."

The Commission has confessed that the order of Aug. 31, 1932, Exhibit M, is illegal and counsel are correct in stating that the Commission does not contend that the decree insofar as it enjoins its enforcement should not stand.

The Commission does contend that that part of the decree is invalid which enjoins the enforcement of the order of August 31, 1932, Exhibit L, wherein it found that the 40 cent gate rate charge is unreasonable and

that the distributing companies should not charge to operating expenses more than 30 cents and requiring the distributing companies to appear on a day certain and show cause why their local rates should not be adjudged accordingly and contends that the decree of the lower court, enjoining its enforcement, should be reversed, either because the District Court had no jurisdiction of the controversy insofar as it affected its order, Exhibit L, or because on the merits the order was right.

Appellees contend that when the Commission filed its answer, abandoning and confessing that its second order of August, 1931, Exhibit M, was invalid, that the court should have entered a permanent injunction and ended the case. That thereupon the case became moot because the case was there without a rate order, and that its finding and proceedings were unnecessary but that its decree enjoining the enforcement of the first order Exhibit L, as to the reasonableness of the contracts, did not become invalid and should not be set aside by this Court.

This is the substance of their contention set out on page 13 of their supplemental brief.

Appellees did not so contend in the lower court. Notwithstanding that the Commission abandoned and confessed the invalidity of the second order, Exhibit M, appellees continued to claim that by the first order their property was confiscated and by their continued prosecution of their action, after the second order, Exhibit M, went out of the case, induced the court to make findings that the cost of gas to the distributing companies

determined by the first order Exhibit M, was unreasonably low and confiscatory of their property and to enter a decree enjoining the enforcement of that order. That decree still stands, and appellant has appealed from it. We think if appellees' contention is correct, that the cause became moot when the order Exhibit M went out, then that the decree which enjoins the order of the Commission Exhibit L, should be set aside. If the question before the court was moot then it had no right to enjoin the first order as confiscatory and its decree in that respect should be set aside. On the other hand, if the question was not moot and the court had jurisdiction to enjoin the first order Exhibit L, then this Court has jurisdiction to entertain this appeal and to decide the case on the merits and review the question presented to and decided by the lower court as to whether said order Exhibit L is confiscatory of appellees' property or invades their constitutional rights, as claimed in their bill.

CONSIDERATION GIVEN INDUSTRIAL GAS.

Under the heading jurisdiction in their original brief the appellees attempt to attack the order of the Commission on the basis that it undertook to investigate the pipeline's operations as a whole and did not distinguish between the industrial and domestic business. They state:

> "So far as appears from the record and so far as any facts were developed by the said investigation, the domestic business in Kansas may have been carried on by the Cities Service Gas Company at an actual loss. The record does show that the com-

pany's industrial business was greater in extent so far as the amount of gas sold was concerned than its domestic business." (Appellees' brief, pp. 29, 30.)

Without dignifying the statement with our own denial, it is answered by appellees themselves in their attempt to justify burdening the domestic consumer with their loss of income from industrial sales.

On page 159 of their brief they state:

"The supply to industries is purely incidental and is entered into because service to domestic consumers could not otherwise be maintained. *** Therefore industrial business is not primarily sought, or kept for the purposes of profit but as a guarantee to domestic service. The price at which industrial gas is sold is determined absolutely by the price of other fuels. Before industries can be interested in the use of gas as a fuel it must be shown that they can make a saving over coal or oil, consequently without regard to profit, and even if the company was merely trading dollars, it would still be essential that the industrial business be maintained."

BUSINESS IN KANSAS.

Under the heading jurisdiction in their original brief appellees attempt to make a point of the alleged fact that most of the pipeline company's business is outside of Kansas.

On page 30 of their brief they state:

"And the investigation also disclosed that the greater part of the business of the company as a whole was done outside of the State of Kansas."

This statement if it raises any question, is disposed of

by the pipeline company's bill of complaint which states with reference to the total amount of gas sold:

> "About 58% of such gas sold was sold in Kansas and most of that which was sold to domestic consumers in Kansas was and is sold by the distributing company defendants herein." (R. 214.)

ZONING.

Under the heading jurisdiction in their original brief page 27 the companies state:

> "The Kansas Commission did not find and made no pretense of finding, the cost of supplying gas at any city gate."

This suggestion is contrary to the findings of both the court and the Commission and contrary to the evidence submitted by the companies.

One of the reasons for joining all of the companies in the investigation was to enable all of them to be present to protect their respective interests in the question of different costs at the different city gates.

No claim was made before the Commission or before the lower court that the cost at the city gates should not be the same for all the operating units. On the contrary all of the companies came before the Commission and submitted many pages of testimony contending that the gas from so many different sources was so comingled and the pipe lines were so interconnected that the cost should be the same at all cities.

On such testimony the Commission found a uniform rate as did the lower court, and the record is free of any evidence to support a contrary finding.

We believe that this suggestion now made for the first time in view of the evidence submitted is unfair both to the Commission and the court below.

CONCLUSION.

We submit in conclusion that the contentions of appellees in this controversy show a continued effort on the part of the companies to prevent a determination of the reasonableness of the payments made to the pipeline company for gas.

The decisions of the Federal Courts and the Supreme Court of the State of Kansas show a consistent effort upon the part of the Public Service Commission to investigate into the reasonableness of the payments made by the distributing companies to their affiliated pipeline company for gas. The decisions show a consistent and successful effort on the part of the pipeline company and the distributing companies to prevent such an investgiation.

The pipeline company in 1923 sought the jurisdiction of the Commission to obtain assistance because of rate controversies with the disrtributing companies none of which were then affiliated. The forty cent rate was then established because of the testimony showing a very limited supply of gas. Since that time new gas fields have been discovered which make available an almost unlimited supply of gas and the reason for the forty cent rate no longer exists. (See Record 72.)

All efforts of the Commission to investigate the reasonableness of the charge have met with technical objec-

tions not only by the pipeline company but by the distributing companies. (See Wichita Gas Co. v. Public Service Com., 126 K. 220; Wichita Gas Co. v. Public Service Commission, 3 F. Supp. 722; Western Distributing Company v. Public Service Commission, 285 U. S. 119.)

This is the only time the Commission has ever made a valuation of the pipeline company's property. Heretofore it has been precluded from such step by the claim that the pipeline was engaged in interstate commerce and that the reasonableness of its charges to its affiliated distributing plants was a matter of no concern to the Commission or at least that the authority of the Commission did not permit it to test the reasonableness of such contracts by the cost of the service rendered.

In this case the Commission for the first time has attempted to apply this test of reasonableness of the contracts under the authority of Smith v. Illinois Bell Telephone Company, 282 U. S. 133, and Western Distributing Company v. Public Service Commission of Kansas, 285 U. S. P. 119, and are again met with the same contentions.

In the case now on appeal the companies present many points of law in an attempt to have the decree of the lower court sustained without a consideration of the case on its merits. Although the only point which it pressed before the lower court was the confiscatory character of the order.

We respectfully request in conclusion that the Court guard carefully the jurisdiction of the Commission so that

it may not be prevented from proceeding to a final determination of the local rates, and we submit that if the Court finds that it has no jurisdiction of the case because of the absence of a Federal question, the decree of the lower court should be reversed insofar as it attempts to enjoin the Commission from proceeding under its order Exhibit L.

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APPENDIX.

KANSAS STATUTES.

66-107. Service, facilities, regulations and rates established by utilities. Every common carrier and public utility governed by the provisions of this act shall be required to furnish reasonably efficient and sufficient service, joint service and facilities for the use of any and all products or services rendered, furnished, supplied or produced by such public utility or common carrier and to establish just and reasonable rates, joint rates, fares, tolls, charges and exactions and to make just and reasonable rules, classifications and regulations; and every unjust, or unreasonable discriminatory or unduly preferential rule or regulation, classification, rate, joint rate, fare, toll or charge demanded, exacted or received is prohibited and hereby declared to be unlawful and void, and the public utilities commission shall have the power, after notice and hearing of the interested parties, to require any common carriers and all public utilities governed by the provisions of this act to establish and maintain just and reasonable joint rates wherever the same are reasonably necessary to be put in, in order to maintain reasonably sufficient and efficient service from such public utilities and common carriers.

66-110. Revision by commission of service, rates, regulations and practices. It shall be the duty of the commission, either upon complaint or upon its own initiative, to investigate all rates, joint rates, fares, tolls, charges and exactions, classifications or schedules of rates, or joint rates and rules and regulations, and if after full hearing and investigation the commission shall find that such rates, joint rates, fares, tolls, charges or exactions, classifications or schedules of rates or joint rates, or rules and regulations, are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates, fares, tolls, charges, exactions, clas-

sifications or schedules of rates or joint rates and such rules and regulations as shall be just and reasonable. If upon any investigation it shall be found that any regulation, measurement, practice, act or service complained of is unjust, unreasonable, unreasonably inefficient, insufficient, unduly preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this act or of the orders of this commission, or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts, and to make such order respecting any such charges in such regulations, measurements, practices, service or acts as shall be just and reasonable. Whenever, in the judgment of the public utilities commission shall have power to establish just and reasonable concentration, commodity, transit or other special rates, charges or privileges, but all such rates, charges and privileges shall be open to all users of a like kind of service under similar circumstances and conditions.

66-111. Investigations by commission on or without complaint. Upon a complaint in writing made against any common carrier or public utility governed by the provisions of this act, by any mercantile, agricultural or manufacturing organization or society, or by any body politic or municipal organization, or by any taxpayer, firm, corporation or association, that any of the rates or joint rates, fares, tolls, charges, rules, regulations, classifications or schedules of such public utility or common carrier are in any respect unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential, or both, or that any regulation, practice or act whatsoever, affecting or relating to any service performed or to be performed by such public utility or common carrier for the public, is in any respect unreasonable, unfair, unjust, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, or that any service performed or to be performed by such public utility or com-

mon carrier for the public is unreasonably inadequate, inefficient, unduly insufficient or cannot be obtained, the commissioners shall proceed, with or without notice, to make such investigation as they may deem necessary. The commissioners may, upon their own motion, and without any complaint being made, proceed to make such investigation, but no order affecting such rates, joint rates, tolls, charges, rules, regulations and classifications, schedules, practices or acts complained of shall be made or entered by the commission without a formal public hearing, of which due notice shall be given by the commission to such public utility or common carrier or to such complainant or complainants, if any. Any public investigation or hearing which such commission shall have power to make or to hold may be made or held before any one or more commissioners, and all investigations, hearings, decisions and orders made by a commissioner shall be deemed and held to be the investigations, hearings, decisions and orders of the public utilities commission, when approved and filed by such commission and filed in their office, and the commission shall have power to require such public utilities and common carrier to make such improvements and do such acts as are or may be required by law to be done by such public utility or common carrier."

66-113. Orders made on hearings. If upon such hearing and investigation the rates, joint rates, fares, tolls, charges, rules, regulations, classifications, or schedules of such common carrier or public utility governed by the provisions of this act, are found to be unjust, unreasonable, unfair, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of this act, or of any of the laws of the state of Kansas, the public utilities commission shall have the power to fix and establish, and to order substituted therefor, such rates, joint rates, fares, tolls, charges, rules, regulations, classifications or schedules as it shall find, determine or decree to be just, reasonable and necessary; and if it shall be found that any regulation, practice or act whatsoever, relating

to any service performed or to be performed by such public utility or common carrier for the public in any respect unreasonable, unjust, unfair, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, or otherwise in violation of any of the provisions of this act, or of any of the laws of the State of Kansas, the public utilities commission shall have full power, authority and jurisdiction to substitute therefor such other regulations, practice, service or act as they find and determine to be just, reasonable and necessary. All orders and decisions of the public utilities commission whereby any rates, joint rates, fares, tolls, charges, rules, regulations, classifications, schedules, practice or acts relating to any service performed or to be performed by such public utility or common carrier for the public are altered, changed, modified, fixed or established, shall be reduced to writing, and a copy thereof, duly certified, shall be served on the public utility or common carrier affected thereby, by registered mail; and such order and decision shall become operative and effective within thirty days after such service, and such public utility or common carrier shall, unless an action is commenced in a court of proper jurisdiction to set aside the findings, orders and decisions of said public utilities commission, or to review and correct the same, carry the provisions of said order into effect.

66-118. Action to vacate orders of commission; appeals. Any common carrier or public utility governed by the provisions of this act, or other party in interest, being dissatisfied with any order of the commission fixing any valuation, toll, rate, joint rate, fare, charge, or findings, rules or regulations, classifications, schedules, or any order or ruling fixing any regulations, practices or service, or order or ruling relating to the issuance of stocks, bonds or other securities hereinafter provided may, within thirty days from the making of such order, commence an action in a court of competent jurisdiction, against the public utilities commission as defendant, to vacate and set aside any such order, finding or decision of the public

utilities commission on the ground that the valuation, toll, rate, joint rate, fare, charges, orders, rules, regulations, findings, classifications or schedules in such decisions are unlawful or unreasonable, or that any such regulation, valuation, practice or service fixed in such order or decision is unreasonable. All actions brought under this section shall have precedence in any court, and, on motion, shall be advanced over any civil cause of a different nature pending in such court, and such action shall be tried and determined as other civil actions. Appeals from any decision of the district court shall be taken from the district court to the supreme court of the state of Kansas, in the same manner as provided by law in other civil actions. During the pendency of any action under the provisions of this act, all orders made by the public utilities commission prescribing rates, joint rates, tolls, fares, charges, rules, regulations, classifications or schedules or findings shall, unless temporarily stayed or enjoined, remain in full force and effect until final judgment is rendered therein. During the pendency of such appeal the judgment of the lower court shall remain in effect, unless stayed by order of the supreme court. Service of summons on any member of the board shall be sufficient service on the board.